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Supreme Court, U.S.
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NO. 85-1442

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

OTIS BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,
Petitioner,

- vs -

EDNA JOHNSON, et al.,
Respondents.

RESPONDENTS' MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Responderts, pursuant to Sup. Ct. R. 46.1, and for the reasons stated herein and in the attached affidavits, move for leave to proceed in forma pauperis before this Court. Respondents are a class of applicants for and recipients of disability benefits under Title II and/or Title XVI of the Social Security Act, 42 U.S.C. §§ 401 et seq. (Title II), §§ 1381 et seq. (Title XVI). See 42 U.S.C. §§ 1382, 1382f and 50 Fed. Reg. 45558 (October 31, 1985) (Restricting payment of Title XVI benefits for individuals without an eligible spouse to persons whose countable income is at a rate of not more than $4032 for calendar year 1986).

The named respondents are Edna Johnson, a Title XVI applicant and recipient, and Jerome Montgomery, a Title II applicant and recipient. Their financial circumstances fairly represent the financial circumstances of class members generally.

Named respondents Johnson and Montgomery both sought leave to proceed in forma pauperis before the United States District Court for the Northern District of Illinois.

Ms. Johnson's motion was granted on June 22, 1983; Mr. Montgomery's motion was denied on August 15, 1983.

Respectfully submitted,

Robert E. Lehrer

One of the Attorneys for Respondents

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NO. 85-1441

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

OTIS BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,
Petitioner,

- vs -

EDNA JOHNSON, et al..
Respondents

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED AS RESPONDENT IN FORMA PAUPERIS

I, EDNA JOHNSON, being first duly sworn, depose and say that I am one of the named plaintiffs and class representatives in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or giving security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of responding to petitioners' Petition For A Writ of Certiorari are true.

1. Are you presently employed? No.

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month you received.

November, 1967
$170/mo.

2. Have you received with the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

Yes

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

SSI -- $336/mo.

3. Do you own any cash or checking or savings acount?

No

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

No

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

None

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Edna Johnson
EDNA JOHNSON

SUBSCRIBED and SWORN to before me this 14th day of April, 1986.

Bennye Clay
NOTARY PUBLIC

NO. 85-1441

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

OTIS BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,
Petitioner,

- vs -

EDNA JOHNSON, et al.,
Respondents

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED AS RESPONDENT IN FORMA PAUPERIS

I, JEROME MONTGOMERY, being first duly sworn, depose and say that I am one of the named plaintiffs and class representatives in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or giving security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of responding to petitioners' Petition For A Writ of Certiorari are true.

1. Are you presently employed? No.

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month you received.
   April, 1976
   $1200/mo.

2. Have you received with the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments interest, dividends, or other source?
Yes

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.
Social Security $705/mo.
Private Pension $83.83/mo

3. Do you own any cash or checking or savings acount?
No

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

a. If the answer is yes, describe the property and state its approximate value.

Family home at 6912 S. Union St., Chicago -- $56,000
1985 Ford Escort -- $6,000

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Elaine Montgomery (wife); Lawrence Montgomery (son)
I pay about $300/mo. in utilities, $60 for real estate taxes and insurance, $200 on the car note, and $30 for life and health insurance in addition to necessary living expenses.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Jerome Montgomery
JEROME MONTGOMERY

SUBSCRIBED and SWORN to before me this 14th day of April, 1986.

Bennye Clay
NOTARY PUBLIC

NO. 85-1442

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

OTIS BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,
Petitioner,

- vs -

EDNA JOHNSON, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly exercised jurisdiction in this class action under 42 U.S.C. § 405(g) (1982), over the claims of those class members who did not fully exhaust their administrative remedies, or obtain a final decision of the Secretary of Health and Human Services within 60 days prior to the filing of the complaint?

2. Whether the court of appeals correctly held that, while the Secretary could lawfully retain a de minimis "severity" step, the existing "severity" regulations and rulings violated the Social Security Act because they resulted in the denial of claims at a threshold level without an individualized assessment of whether claimants could meet their prima facie burden of proving disability?

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October Term, 1985

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,
Petitioner,

- vs -

EDNA JOHNSON, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

Respondents agree with petitioner that the petition for writ of certiorari should be held pending the rulings in Bowen v. City of New York, No. 84-1923 (argued February 26, 1986) and Bowen v. Owens, No. 84-1905 (argued February 26, 1986), but only as to the first question presented. They respectfully request that this Court deny the petition as to the second question presented.

OPINIONS BELOW

The following opinions are reported, in addition to those cited by the Secretary: the December 17, 1984 order of the district court denying the Secretary's motion to alter or amend

the judgment (Pet. App. 65a-76a) */ is reported at 607 F. Supp. 875 (N.D. Ill. 1984); the March 15, 1985 order of the district court denying the Secretary s motion for a stay pending appeal, denying plaintiffs' motion for contempt, and awarding plaintiffs certain additional relief (Pet. App. 78a-95a), is reported at 604 F. Supp. 1070 (N.D. Ill. 1985).

STATEMENT

Respondents brought this class action on behalf of Illinois residents, to challenge the regulations and rulings governing step two of the sequential evaluation process for determining disability claims under the Social Security Act (the "Act"). They claimed that under these step two regulations and rulings, the Secretary of Health and Human Services ("Secretary") violated the Act: (1) by adopting more than a de minimis threshold severity standard, that increased the claimants' statutorily defined prima facie burden of proof and denied them individualized assessments of their claims; and (2) by refusing to consider the combined effect of non-severe impairments.

1. Titles II and XVI of the Act require the payment of disability benefits to any otherwise eligible claimant who meets the statutory definition of disability set forth in 42 U.S.C. §§ 423(d)(1)(A) (1982) and 423(d)(2)(A) (Supp. I 1983), and 1382c (a)(3)(A) and (B)(1) (1982). All twelve courts of appeals have interpreted the Act to provide that if a claimant demonstrates that he has a physical or mental impairment(s) that prevents him

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*/ Citations to the lower court rulings are to the Appendix to the Petition for Certiorari ("Pet. App."). Citations to the Appendix hereto are designated "Resp. Br. App. ____." Respondents also cite to the numbered items in the Record ("R.")in the court of appeals, which is still lodged in that court.

from performing his past work, he meets his prima facie burden of proving disability. (See Pet. App. 15a-16a (citing cases)).

2. In February, 1979, the Secretary established a five-part sequential evaluation process for determining disability claims. 43 Fed. Reg. 55349 (1978)(now codified at 20 C.F.R. §§ 404.1520 and 416.920 (1985)). If the claimant is found not to be disabled at any one of the sequential steps, the analysis is terminated and the claim is denied. See 20 C.F.R. §§ 404.1520 (a) and 416.920(a). At step two, a claimant must demonstrate by medical evidence alone that his impairment is "severe" or his claim will be denied. 20 C.F.R. §§ 404.1520(c) and 416.920(c). No claims are approved at step two. Id.

3. Effective August 20, 1980, the Secretary promulgated two Social Security Rulings ("SSR") interpreting the step two regulations. */ SSR 82-56 stated that an impairment may be con-considered non-severe regardless of whether it prevents the claimant from doing his past work. (Resp. Br. App. 8a). SSR 82-55 (rescinded April, 1985) set forth a list of 20 impairments that were automatically to be held non-severe regardless of whether they prevented the claimant's performance of his past work. (Resp. Br. App. 8a).

4. Effective August 20, 1980, the regulations governing disability determinations were further amended to provide that at step two the Secretary would "consider the combined effects of unrelated impairments only if all were [independently] severe." 45 Fed. Reg. 5574 (1980) (codified at 20 C.F.R. §§ 404.1522 and 416.922) (1982)).

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*/ Like regulations published in C.F.R., SSR's are binding on all Social Security Administration personnel, including state agency adjudicators, Administrative Law Judges ("ALJ"), and the Appeals Council. 20 C.F.R. § 422.408 (1985).

5. Neither the 1979 nor the 1980 regulatory revisions were preceded or accompanied by any relevant amendment to the Act's definition of "disability."

6. During the three fiscal years after the 1979 and 1980 regulations and rulings became effective, the percentage of all Title II benefit denials and terminations occurring at the second step were 39.0% (FY 1980), 45.2% (FY 1981), and 40.3% (FY 1982). House Committee on Ways and Means, WMCP-2, 98th Cong., 1st Sess. Backgound Material and Data on Major Programs at 11 (1983) (R.15, Exh. B). This represented a significant increase in the number of comparable denials and terminations from the three fiscal years preceding the regulatory revisions: 10.8% (FY 1976), 29.8% (FY 1977), and 31 8% (FY 1978). (Id.).

7. On August 11, 1983, respondents, Edna Johnson and Jerome Montgomery, filed an amended class complaint challenging the Secretary's step two "severity" policies insofar as they: (a) increased the claimants' prima facie burden of proof; and (b) failed to consider the combined impact of non-severe impairments. (Pet. App. 1a-2a). They invoked the court's jurisdiction under 42 U.S.C. §§ 405(g) and 1383(c)(3)(1982). (Pet. App. 8a-13a).

(a) Edna Johnson applied for Title XVI benefits on March 24, 1982 at age 54. (Id. at 5a). At that time, she suffered from diabetes mellitus, lumbago, a duodenal ulcer, Schazski's ring of the esophagus and anxiety neurosis. (Id.). Because of her multiple impairments, she had been hospitalized five times since 1970. (Id.).

Ms. Johnson has a tenth grade education. (Id.). Her only past work experience was as a nurse's aide (id.), where she was required to lift patients weighing over 100 pounds. The job of nurse's aide requires medium exertional capacities. (Id.); U.S. Department of Labor, Dictionary of Occupational Titles, 4th

Ed., and Selected Characteristics (1981) ("DOT"); see 20 C.F.R. § 416.967(c) (1985) (defining medium work). Johnson presented unrebutted evidence that she retained the capacity despite her impairments (i.e., residual functional capacity) to perform no more than sedentary work. (Pet. App. at 5a); see 20 C.F.R. § 416.967(a) (1985). Consequently, she did not retain the residual functional capacity (i.e. medium) to perform her past work. (Pet. App. 5a); cf. Secretary's Memorandum of Law in Support of Summary Judgment at 4 n.3 (R. 46) (Agreeing that Johnson cannot do medium work).

After Johnson's application was denied both initially and upon reconsideration at the second step, she appeared before an ALJ. (Pet. App. 5a). The ALJ considered each of her impairments in turn and ruled that each one, taken separately, was not severe. (Id.). Accordingly, he denied the claim; the Appeals Council affirmed. (Id.).

(b) Jerome Montgomery has a sixth grade education. (Id. at 6a). He worked for 28 years as a butcher, cutter and boner in a meat packing plant until illness forced him to stop working. (Id.). In 1976, the Secretary awarded him Title II disability benefits due to his diabetes and heart disease. (Id. at 5a-6a).

On January 8, 1982, the Secretary informed Montgomery that as of October, 1981 he was no longer considered to be disabled. (Id at 6a). Montgomery then appealed his termination of benefits to an ALJ. At the hearing, he presented unrebutted evidence that he suffered from hypertension, ischemic heart disease with angina pectoris, diabetes, mild obesity, degenerative osteoarthritis of the spine, and the effects of fractures at the hip, leg and foot. (Id.).

Montgomery's past jobs required "heavy" exertional capa-

city, although a butcher's job could also be classified as "medium." (Id.); DOT; see, 20 C.F.R. § 404.1567(c) and (d) (1985) (defining medium and heavy work). The uncontroverted evidence of record shows that Montgomery retained the residual functional capacity to perform no more than sedentary work due to his combined impairments. (Pet App. 6a). See 20 C.F.R. § 404.1567(a) (1985). Consequently, he did not retain the residual functional capacity (i.e., heavy or medium) to perform his past work. (Pet. App. 6a); cf. Secretary's Memorandum of Law in Support of Summary Judgment at 31-32 (R. 46) (Not challenging contention that Montgomery could do no more than sedentary work).

The ALJ reversed the termination decision and ruled that Montgomery continued to be disabled. (Pet. App. 6a). On its own motion, the Appeals Council reversed the ALJ's decision and reinstated the previous termination decision. (Id.). It held that hypertension, heart disease, diabetes and osteoarthritis were each per se non-severe under SSR 82-55. (Id. at 6a); see ¶ 3, supra. Because the same ruling prohibited consideration of the combined effect of all non-severe impairments to determine severity, Montgomery was held to be not disabled. (Pet. App 6a).

8. On December 7, 1983, the United States District Court for the Northern District of Illinois certified a plaintiff class. The court refused to exclude from the class those claimants who had not fully exhausted their administrative remedies. (Id. at 42a-47a).

9. On September 19, 1984, the district court granted summary judgment to respondents and invalidated the Secretary's step two policies as violative of the Act insofar as they: (a) impermissibly increased the claimants' statutorily defined prima facie burden of proof; and (b) failed to consider the combined effect of non-severe impairments. (Id. at 55a-62a). In its

subsequent orders dated December 17, 1984, and March 15, 1985, the court emphasized the "narrow" scope of its September 19th ruling. (Id. at 74a).

(a) The district court stated that its rulings "invalidated neither the sequential evaluation process nor the severity concept" and did not preclude a "severity" determination based on medical factors alone. (Id. at 74a). It stated that the Secretary was not required to fully consider age, education or work experience at the second step. (Id.) (citing Johnson, at Pet. App. 58a). The court only invalidated a threshold step two test to the extent that it exceeded the claimants' statutorily defined prima facie burden of demonstrating an inability to do past work. (Id.).

(b) The district court also emphasized that its decision permitted the Secretary to impose a de minimis threshold standard under which claimants might be denied benefits at step two on the basis of medical factors if they suffered from only a slight impairment that could not be disabling, regardless of their age, education and work experience. (Id. at 86a-87a).

10. On July 30, 1985, the court of appeals affirmed the district court's rulings. (Id. at 27a). In reviewing the statutory requirements for obtaining disability benefits, the court observed that "all twelve circuits have unanimously held that ... the plaintiff makes a prima facie showing when he demonstrates an impairment which prevents him from performing his previous work." (Id. at 15a). The court then noted that a de minimis step two standard "determin[ing] that a person is not disabled ... based on a judgment that the person has no impairment, or that the impairment or combination of impairments are slight enough to warrant a presumption that the person's work ability is not seriously affected" would conform with the Act's

requirements. (Pet App. at 19a, quoting H.R. Rep. No. 98-618. 98th Cong., 2d Sess. 7-8 (1984), reprinted in 1984 U.S. Code, Cong. & Ad. News 3038, 3044-45; see Pet. App. 17a-22a). The court accepted respondents' argument that the challenged regulations and rulings "do not permit a 'de minimus' reading." (Id. at 18a, 17a-22a). Rather, the Secretary unlawfully denied claims at the second step without an individualized assessment of the effect of a claimant's impairment(s) and regardless of whether a claimant had met his prima facie burden of showing an inability to do his past work. (Id. at 16a-22a). Therefore, the court invalidated the challenged regulations and rulings. (Id. at 21a-22a). In addition, the court affirmed the district court's ruling that the "plain language" of the statute required the Secretary to consider the combined effect of non-severe impairments. (Id. at 22a-26a).

11. On September 9, 1985, the Secretary submitted a petition for rehearing with a suggestion for rehearing in banc. In support of the petition on September 17, 1985, the Secretary submitted a draft unpublished version of a new SSR (later denominated after revisions as SSR 85-28, Resp. Br. App. 1a-6a) which was to become effective upon publication. The draft ruling stated that it was being issued to "reflect certain circuit court decisions that have taken issue with the Secretary's previously stated definition of 'not severe' impairments." (Resp. Br. App. 1a). The ruling cited with approval Baeder v. Heckler, 768 F.2d 547 (3d Cir. 1985), explaining that the "severity regulation" was meant "to do no 'more than allow the Secretary to deny benefits summarily to those applicants with impairments of a minimal nature which could never prevent a person from working.'" (Id. at 3a, quoting Baeder, 768 F.2d at 553).

12. The Secretary's petition for rehearing was denied by an equally divided court on October 28, 1985. Neither the court's order denying the petition, nor Judge Easterbrook's opinion dissenting from the denial, referred to the new SSR.

13. On November 15, 1985, the Secretary published SSR 85-28, which differed in some respects from the draft which had been submitted to the court of appeals. The SSR states that an "impairment or combination of impairments is found 'not severe' ... at [the second] step when medical evidence establishes only a slight abnormality or a combination of slight abnormalities which would have no more than a minimal effect on an individual's ability to work even if the individual's age, education, or work experience were specifically considered ..." (Id. at 4a) (emphasis added). The SSR also stated that "[g]reat care should be exercised in applying the not severe impairments concept. If an adjudicator is unable to determine clearly the effect of an impairment or combination of impairments on the individual's ability to do basic work activities, the sequential evaluation process should not end with the not severe evaluation step." (Id. at 5a).

14. The Secretary has never submitted the published version of SSR 85-28 to the trial court or court of appeals here.

REASONS WHY THE PETITION SHOULD BE HELD IN PART, AND DENIED IN PART

I. INTRODUCTION

The Secretary acknowledges that neither of the questions

he presents merits plenary review. */ He urges instead that "the petition be disposed of as appropriate in light of the Court's rulings in ... other cases": Bowen v. City of New York, No. 84-1923 (argued Feb. 26, 1986) ("City of New York"), Bowen v. Owens, No. 84-1905 (argued Feb. 26, 1986) ("Owens") and Bowen v. Yuckert, petition for cert. pending, No. 85-1409 (filed February 21, 1986) ("Yuckert"). City of New York and Owens present similar 42 U.S.C. § 405(g) (1982) ("Section 405(g)") questions to the ones raised here; Yuckert assertedly presents the same severity step question.

Respondents agree with the Secretary that the petition is appropriately held and disposed of as to the Section 405(g) question, in light of the Court's rulings in City of New York and Owens. See § II, infra. Respondents submit, however, that certiorari should be denied as to the severity step question, regardless of the disposition of the Yuckert petition. See § III, infra.

II. THE SECTION 405(g) QUESTIONS ARE PROPERLY DISPOSED OF AS APPROPRIATE IN LIGHT OF THE COURT'S RULINGS IN CITY OF NEW YORK AND OWENS

The Secretary correctly states that the Section 405(g) questions presented in City of New York and Owens and the Section 405(g) questions presented by the court of appeals ruling here are "closely related." (Pet. at 12). Consequently, it would be appropriate to hold the petition here with respect to the

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*/ Respondents refer to the first question the Secretary presents as the "Section 405(g) question." See Petition at (I) (question "1"). They refer to the second question he presents as the "severity step question." See id. at (I) (question "2").

Section 405 (g) questions, pending the Court's rulings in City of New York and Owens. See generally R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice § 5.9 (1986).

III. CERTIORARI SHOULD BE DENIED AS TO THE SEVERITY STEP QUESTION

A. Certiorari Should Be Denied Here Because Certiorari Should Be Denied In Yuckert

The Secretary concedes that if certiorari is denied in Yuckert, it should also be denied as to the severity step question here. (Pet. at 12-14). Certiorari should be denied in Yuckert. for substantially the reasons stated in the brief in opposition to certiorari to be submitted in that case and for the reasons stated here.

Respondents sharply disagree with the Secretary's interpretation of Yuckert. He reads Yuckert to "require the decision maker to consider the vocational factors of age, education and work experience" at step two of the sequential evaluation process and, therefore, to prohibit the Secretary from employing any threshold "severity step" at all. (Yuckert Pet. at 19; id. at 8-11, 18-19). But Yuckert neither requires that to which the Secretary objects, nor prohibits that which the Secretary favors.

As the Yuckert court correctly noted the Act requires the Secretary to consider "both medical and vocational factors" in making the ultimate determination of disability. Yuckert, 774 F.2d 1365, 1368, 1369-70(9th Cir. 1985). It invalidated the Secretary's severity regulations because they resulted in denials of benefits to claimants based on medical factors alone, even where consideration of vocational factors could have dictated a different result. Id. But, as the Secretary recognizes, under a

de minimis step two standard, claims would be denied at step two only where the impairments are so slight that no set of vocational factors could ever make a difference in the ultimate disability determination. (Yuckert Pet. 23-24); see (Pet. App. 17a-18a); Statement, at ¶ 9(b), supra. In this sense (as the Secretary himself explains) a de minimis step two test is not "divorced from vocational considerations." (Yuckert Pet. at 23). Since the then-existing severity regulations were entirely "divorced from vocational considerations" -- i.e., they permitted summary denials of claims even when such considerations could make a difference in the ultimate determination of disability -- the Yuckert court concluded that these provisions "conflict with the language of the statute that requires the Secretary, in determining disability, to consider [vocational] factors." Yuckert, 774 F.2d at 1369.

In short, the Yuckert court's reference to the required consideration of vocational factors, id. at 1370, is not a reference to the consideration of such factors at the second step, as the Secretary suggests (Yuckert Pet. at 8-11, 18-19). Rather, it explains why a step two test that could preclude eligible claimants from proving disability by reference to vocational factors (at a later step) is not valid. For the same reason, Yuckert's invalidation of the then-existing severity regulations does not prohibit the Secretary from implementing a de minimis severity step of the type he apparently now seeks to employ -- for such a step has no such preclusive effect. See (Yuckert Pet. at 23-24) (describing de minimis step as one under which only claimants who "would be found not to be disabled at subsequent steps of the subsequential evaluation process in any event" would be denied benefits); SSR 85-28 (Resp. Br. App. 3a)

(same); see also (Pet. App. 27a-18a). */

If this Court agrees with respondents' interpretation of Yuckert, then that ruling does not present the issue for which the Secretary now seeks plenary review. Such a reading, in short, eviscerates the basic predicate of the Yuckert petition -- and with it the rationale for granting certiorari as to the severity step question here.

B. Even If Certiorari Is Granted In Yuckert, It Should Be Denied Here

The Secretary's position is that, if certiorari in Yuckert is granted, the petition here should be held pending the Yuckert decision next term and then be disposed of in light of that ruling. (Pet. at 12-13).**/ This plea is grounded on the conclusory assertion that the severity step issue in the two cases is the same. (Pet. at 13). But a party cannot secure a "hold" of a certiorari petition by a mere assertion of identity or similarity. Rather, there must be a substantive and relevant identity between the questions in the two petitions such that the court of appeals decision below might be changed in light of a plenary decision in Yuckert. This required showing is modest,

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*/ Yuckert also found the step two regulation violative of the Act because it "does not permit the individualized assessment of disability required by the Act," and because it "improperly denies benefits to a claimant who has made a prima facie showing of disability." Yuckert, 774 F. 2d at 1370. These infirmities do not infect every possible threshold severity step. A de minimis step two would suffer from neither of the defects the Yuckert court identified. (Pet. App. 17a-22a). See Statement at ¶ 9-10.

**/ In § III. A., supra, respondents showed that the Secetary's reading of Yuckert was not correct. In § III.B., however, respondents assume arguendo that the Secretary's erroneous reading of Yuckert is accepted and that certiorari will be granted in that case.

but it is not -- and cannot be -- made here.

The Secretary's sole quarrel with Yuckert is that it assertedly disapproved of any threshold severity step, including a de minimis step. (Yuckert Pet. at 7-11, 19-24). He seeks plenary review of that decision to obtain this Court's agreement that the Act authorizes "a preliminary screening of claimants at step 2 of the sequential evaluation process in order to determine whether their impairments are sufficiently minimal to render it unnecessary for the state agency or the ALJ to undertake a full vocational evaluation of the claimant, including a specific consideration of his age, education and work experience." (Id. at 23; see id. at 18, 23-24). Such a ruling from this Court would be entirely consistent with the decision below.

The Johnson court affirmed, without modification, district court rulings that unambiguously allow the Secretary to adopt a de minimis threshold severity test under which a claimant might be denied benefits on the basis of medical factors alone, without full consideration of "past work" or "age, education and work experience." (Pet. App. 22a, 27a, affirming: Pet. App. 78a, 86a ("[R]ead[ing] severity regulation as a de minimis threshold test is entirely consistent with this Court's order." "Vocational factors [need] not ... be considered at the second step."); Pet. App. 65a, 74a ("[T]he Court invalidated neither the sequential evaluation process nor the severity concept."); and Pet. App. 50a, 55a-61a). The court of appeals also explained that a de minimis step two standard that disqualifies claimants when their impairments are so slight that no additional evidence respecting age, education and work experience could establish their eligibility, would square with the Act's requirements.

(Pet. App. 17a-22a). */ Thus, even if the Secretary achieved the result he seeks in Yuckert, the court of appeals decision here would remain unaffected. It follows that there is no reason to hold this petition pending a Yuckert decision.

Moreover, it is the Secretary's own view that the decision to which he objects in Yuckert is far different from the ruling below. He expressly acknowledges that the Johnson court did not require the Secretary to fully consider a "claimant's age, education and work experience in every case" and invalidated the severity step regulations "only to the extent that they do not provide for the claimant to establish a prima facie case by showing an inability to perform his prior work." (Pet. at 13; see Pet. App. 16a-20a).**/ He recognizes, in short, that what he objects to in Yuckert is not part of the ruling below.

C. The Court Of Appeals Ruling Is Apparently Consistent With The Secretary's New Severity Step Policy, Does Not Conflict With Other Appellate Decisions In A Manner Warranting Plenary Review, And Is Clearly Correct

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*/ The court of appeals' limited ruling adopted the narrow argument respondents advanced there. They urged that the statutory infirmity infecting the Secretary's step two regulations and rulings was that they permitted a claimant to be denied benefits at step two even though he was able to meet his prima facie burden of proof at a later step of the sequential evaluation process under an individualized assessment of the factors made relevant by the Act. See § II.B.2, infra. (Pet. App.16a-17a). Respondents never resisted a de minimis step two threshold severity test. (Id.). On the contrary, they stressed that a de minimis step two severity test would be valid. (Id.).

**/ In dissenting from the denial of the petition for rehearing in banc, Judge Easterbrook "assume[d]" that the "panel's decision . . bar[s] the use of any step two hurdle ...." (Pet. App. 34a). That assumption was in error. The court of appeals permitted a de minimis "step two hurdle," as the Secretary concedes by his description of the Johnson ruling quoted in the text.

The petition should also not be held because the ruling below is apparently consistent with the Secretary's description of his new written policies, does not conflict with decisions of the other appellate courts in a manner that would warrant holding the petition, and correctly interprets the Act.

1. By promulgating SSR 85-28, the Secretary has sharply changed his policy and appears to have eliminated any dispute with the decision below. The Secretary vigorously defended a threshold severity step that was not a de minimis step, and that distorted the well-established statutory allocation of the burdens of proof. E.g., Pet. App. 18a-22a; Baeder v. Heckler, 768 F.2d 547, 551 (3d Cir. 1985); Stone v. Heckler, 752 F.2d 1099, 1103 (5th Cir. 1985); Brady v. Heckler, 724 F.2d 914, 920 (11th Cir. 1984). After the denial of the rehearing petition, however, the Secretary -- without judicial coercion -- published SSR 85-28, in which he announced that he had "reevaluat[ed]" the step two test, and was now "clarify[ing]" it so that it was "consistent with various court decisions," including specifically Baeder and Stone. SSR 85-28 (Resp. Br. App. 3a). This "clarification" in fact was a significant policy change, and it also caused a change in litigation position here. The SSR 85-28 step two test, as described by the Secretary (Yuckert Pet. at 20 n.13, 21-24) is substantially the same as the de minimis test set forth in Brady and endorsed by the court of appeals here. Compare SSR 85-28 (Resp. Br. App. 4a) with Brady, 724 F.2d at 920 and (Pet. App. 17a-22a). */ In short, what the court of appeals found

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*/ A de minimis threshold severity test respects the statutory allocation of the burden of proof because, by definition, it

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found that the Secretary might lawfully do at step two, is apparently what he now has done. Thus, the petition should be denied because there is no reason to review a court decision invalidating step two policies the Secretary has now abandoned.

2. There is no conflict among the court of appeals decisions that warrants holding the petition here (or granting certiorari in Yuckert). Every one of the relevant decisions (including all those cited by the Secretary, Yuckert Pet. 21-23), reads the Act to invalidate any threshold severity step that authorizes the summary denial of benefits to any claimant with more than a de minimis or slight impairment. Each of the courts allows the Secretary to adopt a de minimis threshold severity step, "provid[ing] for the denial of benefits to claimants who have slight or minimal impairments." (Yuckert Pet. at 22). The only difference among the circuit court rulings is that some courts imposed a de minimis interpretation on the existing step two regulations, while others opted to strike down the regulations while allowing for -- even inviting -- the promulgation of a valid step two regulation. The first group includes: Salmi v. Secretary of Health and Human Services, 774 F.2d 685 (6th Cir. 1985); Farris v. Secretary of Health and Human Services, 773 F.2d 85 (6th Cir. 1985); Garza v. Heckler, 771 F.2d 871 (5th Cir. 1985); Stone v. Heckler, 752 F.2d 1099 (5th Cir. 1985); Estran v. Heckler, 745 F.2d 340 (5th Cir. 1984); Flynn v. Heckler, 768 F.2d 1273 (11th Cir. 1985); Brady v. Heckler, 724

_/ Footnote continued.

results in denials of benefits at step two only to claimants who "would be found not to be disabled at subsequent steps of the sequential evaluation process in any event," (Yuckert Pet. at 24) i.e., who would be unable to meet their statutory burden of proof at a later step. In SSR 85-28 the Secretary has thus sought to give the pre-existing severity regulations and rulings a de minimis interpretation. (Compare, Stone, 752 F.2d at 1105.

F.2d 914 (11th Cir. 1984); Evans v. Heckler 734 F.2d 1012 (4th Cir. 1984). The second group includes: this case; Brown v. Bowen, No. 85-1736 (8th Cir. March 25, 1986) (Resp. Br. App. 21a); Hansen v. Heckler, 783 F.2d 170 (10th Cir. 1986); Yuckert; and Baeder v. Heckler 768 F.2d 547 (3d Cir. 1985). See also Dixon v. Heckler, ___ F.2d ___, Unempl. Ins. Rep. (CCH) ¶ 16,640 (2d Cir. 1986).

In short, all the courts of appeals to have addressed the issue have interpreted the relevant requirements of the Act in the same way and have either specifically endorsed a de minimis standard at step two or left the Secretary free to adopt such a standard. The only distinction among the cases lies in the remedial avenue chosen to achieve compliance with the Act's requirements.

The Secretary attempts to manufacture a conflict worthy of this Court's attention. He claims that the courts that have not invalidated the severity regulations have "correctly construed [them] to provide for the denial of benefits to claimants who have 'slight' or 'minimal' impairments," (Yuckert Pet. at 22), while he implies that the courts that have invalidated the regulations would not allow even a de minimis step two test. (Id. at 21-22); (Pet. at 13). The claimed conflict rests solely on two distortions.

First, not one of the circuits upheld the existing regulations and rulings as the Secretary had interpreted and applied them. Instead, the circuits the Secretary now denominates as "correct" adopted and imposed on the Secretary the de minimis interpretation of the regulations first announced in Brady: "[A]n impairment can be considered as not severe only if it is a slight abnormality which has such a minimal effect on the individual that it would not be expected to interfere with the in-

dividual s ability to work, irrespective of age, education or work experience." Brady, 724 F.2d at 920.

Second the Secretary's view that the courts that did not invalidate the regulations were "correct" is of very recent vintage. Those rulings became "correct" only on November 15, 1985, with his reevaluation and change in policy through SSR 85-28. Statement at ¶ 13, and § III.C.1. supra. Prior to that, the Secretary always opposed a de minimis step two test and consistently defended the regulations and rulings creating a more onerous standard. Compare (Pet. App. 17a-22a), with (Yuckert Pet. 20 n.13, 21-24).*/

Baeder was the first ruling that invalidated the step two regulations. The court held that, "we believe that Section [20 C.F.R. 404.]1520(c) of the regulations does more than allow the Secretary to deny benefits summarily to those applicants with impairments of a minimal nature ... We will not rewrite the regulation to make it conform to the statutory mandate, although other courts have ... As it stands, we hold that the severity regulation ... is inconsistent with the Social Security Act, and

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*/ In Stone, the court noted the Secretary's continued refusal to follow Brady despite three previous Fifth Circuit decisions adopting it, and held that in every case where the Secretary neither cited Fifth Circuit precedent nor recited the Brady formulation, the claim had to be remanded on the assumption that the wrong interpretation had been applied. Stone, 752 F.2d at 1106. Despite the Secretary's present position that Stone and Brady are "correct," he continued to oppose the de minimis test in the Fifth and Eleventh circuits even after those cases were decided. E.g., Garza, 771 F.2d at 873; Jason v. Heckler, 767 F.2d 82, 85 (5th Cir. 1985); Davis v. Heckler, 759 F.2d 432, 435 (5th Cir. 1985); Flynn, 768 F.2d at 1275.

therefore, is invalid." Baeder, 768 F.2d at 553 (emphasis added). */

In Hansen, which also strikes down the step two regulations, the court stated that, "the severity regulation can be reconciled with the Act and the case law only if it is used as a preliminary screening device to deny claimants with impairments so minimal that they could under no circumstances have a serious impact on the ability to work." 783 F.2d at 174. The court noted that the Secretary had refused to "apply in total the de minimis standard required by the relevant court decisions," id. at 175, and that Stone revealed the Secretary's refusal to follow even repeated court of appeals pronouncements of the de minimis standard. Id. at 176. Thus, like the court below, the Hansen court was left with no viable alternative by the Secretary, but to invalidate the existing step two regulations. Id. Accord Brown v. Bowen, slip op. at 5-6 (Resp. Br. App. 25a-26a).

In sum, the Secretary's presentation of the conflict assertedly warranting resolution by this Court is flawed at each critical juncture. Not only is there no conflict among the courts of appeals as to the requirements of the Act, but the courts have been unanimous in condemning the Secretary's severity step regulations as he has interpreted and applied them to deny benefits to a claimants with more than a de minimis impairment.

3. The petition should also not be held because the step two ruling below was clearly correct.

(a) The statutory definition of disability and the legislative history of the Act have caused "all twelve circuits to have unanimously held that, while the ultimate burden of prov-

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*/ The Third Circuit, like the other courts invalidating the regulations, declined to impose upon them an interpretation the Secretary resisted. Instead it left him free to write new regulations consistent with the Act.

ing disability lies with the claimant. the plaintiff makes a prima facie showing when he demonstrates an impairment which prevents him from performing his previous work." (Pet. App. at 15a) (citing circuit court cases). */ The Secretary's pre-SSR 85-28 step two regulations and rulings did not respect this statutory allocation of the burden "because they deny benefits even to the plaintiff who has carried his prima facie burden." (Id. at 16a). The court of appeals' burden of proof ruling thus prohibited only that practice clearly prohibited by the unanimous rulings of the courts of appeals.

(b) This Court has recognized that the Act requires individualized disability determinations. Heckler v. Campbell, 461 U.S. 458, 467 (1983). The Secretary's step two regulations and rulings violated this statutory principle because they permitted the denial of benefits at step two without consideration of an individual claimant's ability to meet his prima facie burden of proof. (Pet. App at 17a). As the court of appeals noted, the Secretary summarily denied benefits to both of the named plaintiffs on the basis of just such a non-individualized determination, even though both claimants had met their prima facie and ultimate burdens of proof under the Act. (Id. 5a-6a, 17a).**/

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*/ The Secretary focuses on the legislative history to support his authority to implement a de minimis threshold test under the Act. (Yuckert Pet. at 11-21); see, § III.C.1, supra. But the decision below also reads the legislative history to permit a de minimis standard. (Pet. App. 18a-21a).

**/ In dissenting from the denial of the petition for rehearing in banc, Judge Easterbrook characterized the Secretary's step two regulations as "meek", designed "merely to filter

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(c) Every circuit to have addressed the severity step question -- ten in all -- has left the Secretary free to adopt a de minimis step two test and found that the policies invalidated here exceeded the strictures of such a test. See § III.C.2, supra. Not even the Secretary now defends the statutory integrity of his old (pre-SSR 85-28) step two policies. See § III.C.1, supra.

D. Holding The Petition Would Harm Those Respondents Concededly Entitled To Relief

While the Secretary does not and cannot advance any legitimate interest to be served by holding the petition, many respondents have a substantial interest in its expeditious resolution. Their interest arises from their right to relief that the Secretary does not challenge, and which cannot be affected by the rulings in City of New York, Owens, or Yuckert.

The severity step question posed here concerns only those regulations (declared invalid by the court of appeals) that increased claimants' statutory burden of proof -- 20 C.F.R. § 404.1520(c) and 416.920(c). (See, Pet. at 1 (Question 2)); Pet. App. 2a-4a). It does not concern the second part of the court of appeals step two ruling, which was that the Act at all relevant times had required the Secretary to "consider the combined effect of all of the claimants' impairments," and that the Secretary's nonconforming regulations (20 C.F.R. §§ 404.1522 and 416.922 (1984)) were invalid. (Pet. App. 22a-27a. See Pet. at 1 - 14) (no reference to combination regulations or to

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*/ Footnote continued.

out people without hope of getting benefits at later stages of the sequential evaluation process." (Pet. App. 34a). The cases of the named plaintiffs illustrate that the actual effect of the regulations was very substantial, resulting in benefit denials to thousands of claimants who not only might have shown that they meet the requirements for disability benefits at later steps, but who had made that showing.

that part of decision invalidating them)). Under this ruling, all class members are entitled to a redetermination of their eligibility for benefits under a standard which considers the combined effect of all of their impairments. (Pet. App. 27a; aff'g, Pet. App. 74a-76a, 90a-95a). A significant portion of the class -- namely those members who received a final decision of the Secretary within 60 days prior to the filing of the complaint -- are entitled to that relief regardless of what is decided in City of New York, Owens or Yuckert. This is because those class members cannot possibly run afoul of procedural rulings adverse to respondents in City of New York or Owens, and because Yuckert does not raise any question involving the Secretary's obligation to combine impairments. In this context, holding the petition here will, for a long time, deprive many respondents of relief to which they are concededly entitled now. When the Secretary presents no legitimate reason for holding the petition, such delay should not be permitted.

* * *

The Secretary incorrectly has sought to ascribe to the Seventh Circuit the view that, because it invalidated the severity regulations, it prohibited him from adopting a preliminary screening step which would deny disability benefits to claimants with minimal impairments on the basis of medical factors alone. But the court of appeals has never adopted this view. On the contrary, it held that the Secretary's adoption of such a test would conform with the Act's requirements. (Pet. App. at 17a-22a); see Bunch v. Heckler, 778 F.2d 396, 398 n.4 (7th Cir. 1985). See § III. B. supra. In this context, there is no possibility that any plenary decision in Yuckert

would effect the severity step ruling below -- a ruling which is, in any case, clearly correct, not in conflict with any other court of appeals decision, and apparently in conformity with the Secretary's current severity step policies.

CONCLUSION

Insofar as the petition presents the Section 405(g) question, it should be held and disposed of in light of the plenary rulings in City of New York and Owens. But certiorari should be denied as to the severity step question, regardless of the disposition of the Yuckert petition. */

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*/ One possible disposition of the Section 405(g) question, in light of the plenary rulings in City of New York and Owens, would be for this Court to grant certiorari, vacate the judgment below in relevant part, and remand it for reconsideration in light of those decisions. If this is done, and the court of appeals severity step ruling is left intact, respondents respectfully request that the Court's vacation order specifically denote that it is limited to that part of the court of appeals decision relating to the Section 405(g) "jurisdictional issues." (Pet. App. 8a-13a).

Respectfully submitted,

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April, 1986

Part IB
Rulings Based on
Program Policy Statements

(PPS-122) SSR 85-28

TITLES II AND XVI: MEDICAL IMPAIRMENTS THAT ARE NOT SEVERE

PURPOSE: To clarify the policy for determining when a person's impairment(s) may be found "not severe" and, thus, the basis for a finding of "not disabled" in the sequential evaluation of disability, and thereby reflect certain circuit court decisions that have taken issue with the Secretary's previously stated definition of "not severe" impairments.

CITATIONS (AUTHORITY): Sections 216(i), 223(d), and 1614(a)(3)(A) of the Social Security Act, as amended. Regulations No. 4, sections 404.1520-404.1523 and Regulations No. 16, sections 416.920-416.923.

PERTINENT HISTORY: The basic definition of disability is contained in sections 223(d)(1)(A) and 1614(a)(3)(A) of the Act. Under this definition, an individual must have, as an initial requirement, a "physical or mental impairment," as defined in sections 223(d)(3) and 1614(a)(3)(C), and which is expected either to result in death or to last at least 12 months. The principal requirement regarding impairment severity contained in the basic statutory definition of disability is that the individual's inability to engage in any substantial gainful activity (SGA) be "by reason of" the impairment.

In reporting on the Social Security Amendments of 1954 which first introduced the basic definition of disability into the Act, the Senate Committee on Finance indicated that the definition required that there be a "medically determinable *impairment of serious proportions*," that is, "of a nature and degree of severity sufficient to

justify its consideration as the cause of failure to obtain any substantial gainful work."

In the Social Security Amendments of 1967, Congress introduced into the Act the provision in section 223(d)(2)(A) which sets out a specific requirement respecting impairment severity and which provides for the consideration of vocational factors in determining disability. An individual "... shall be determined to be under a disability only if his *physical or mental impairment or impairments are of such severity* that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any kind of substantial gainful work which exists in the national economy ..." (emphasis added). In reporting on these amendments, both the Senate Committee on Finance and the House Committee on Ways and Means reaffirmed the need for some assurance that a finding of disability would be based on a *serious impairment*. The Committees explained that the provisions of the amendment would require, in part, that:

> "... an individual would be disabled *only if it is shown that he has a severe medically determinable physical or mental impairment or impairments* ..." (emphasis added).

As in 1954 and 1967, Congress, again, in the Social Security Disability Benefits Reform Act of 1984, made it clear that a denial of disability benefits may be based on medical factors alone. In amending section 223(d)(2) and section 1614(a)(3) of the Act to provide for the evaluation of the impact of multiple impairments throughout the sequential evaluation process, Congress introduced language which affirms the presence of a severity threshold in the adjudicative process:

> "In determining whether an individual's physical or mental impairment or impairments are *of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under this section*, the Secretary shall consider the combined effect of all of the individual's impairments ..."

The validity of a disability decision based on medical considerations alone was also recognized in the Conferees' discussion of the amendment (House of Representatives Conference Report 98-1039 to accompany H.R. 3755, September 19, 1984, p. 30) in which it was stated that there was no intention to "either eliminate or impair" the use of the "current sequential evaluation process."

The principle that a denial determination may be made on the basis of medical considerations alone was first reflected in Regulations No. 4, section 404.1502(a), published in 1960. Regulations published in 1978 revised the 1960 statement concerning such determinations by replacing the phrase "... the only impairment is a slight neurosis, slight impairment of sight or hearing, or other slight abnormality or combination of slight abnormalities ..." with "... the medically de-

terminable impairment is not severe if it does not significantly limit an individual's physical or mental capacity to perform basic work-related functions."

This change in regulatory definition was introduced in the language describing step 2 of the sequential evaluation process which was formalized in regulations effective February 26, 1979. (The 1980 recodification of the Disability Regulations into common sense language reworded the definition of a not severe impairment as follows: "An impairment is not severe if it does not significantly limit your physical or mental abilities to do basic work activities." 20 C.F.R. 404.1521(a) and 416.921(a). Also see sections 404.1520(c) and 416.920(c).) These changes in regulatory language were *not* intended to alter the levels of severity for a finding of not disabled on the basis of medical considerations alone. Rather, they were intended only to clarify the circumstances under which such a finding would be justified (*Federal Register*—March 7, 1978, p. 9296–9297; November 28, 1978, p. 55357–55358). Nevertheless, some recent circuit court decisions have taken exception to the threshold of impairment severity applied in the adjudication of subject cases which were denied on the basis of not severe impairment.

As observed by the Congress, the Social Security Administration (SSA), as part of an ongoing review, is reevaluating the application of the not severe impairment policy and will continue to do so. This ruling is part of the ongoing reevaluation and interprets and clarifies the current policy on not severe impairment, describes the threshold intended, and reflects recent legislation. Also, it is being issued to clarify that SSA's policy is consistent with various court decisions. For example, *Stone* v. *Heckler*, 752 F.2d 1099 (5th Cir. 1985), and *Estran* v. *Heckler*, 745 F.2d 340 (5th Cir. 1984), stated that "an impairment can be considered as not severe only if it is a slight abnormality which has such a minimal effect on the individual that it would not be expected to interfere with the individual's ability to work, irrespective of age, education, or work experience." As *Baeder* v. *Heckler*, No. 84-5663 (3rd Cir. July 24, 1985), suggested, the severity regulation is to do no "more than allow the Secretary to deny benefits summarily to those applicants with impairments of a minimal nature which could never prevent a person from working."

POLICY CLARIFICATION: In determining, for initial entitlement to benefits, whether an individual is disabled, we follow a sequential evaluation process whereby current work activity, severity and duration of impairment, ability to do past work, and ability to do other work (in light of the individual's age, education and work experience) are considered, in that order. See 20 CFR sections 404.1520 and 416.920. In determining continuing entitlement to benefits, the adjudicator, with appropriate consideration of the medical improvement review standard, also follows a sequential evaluation process which includes the "not severe impairment" concept. Fundamental to these processes is the statutory requirement that to be found dis-

abled, an individual must have a medically determinable impairment "of such severity" that it precludes his or her engaging in any substantial gainful work.

As explained in 20 CFR, sections 404.1520, 404.1521, 416.920(c), and 416.921, at the second step of sequential evaluation it must be determined whether medical evidence establishes an impairment or combination of impairments "of such severity" as to be the basis of a finding of inability to engage in any SGA. An impairment or combination of impairments is found "not severe" and a finding of "not disabled" is made at this step when medical evidence establishes only a slight abnormality or a combination of slight abnormalities which would have no more than a minimal effect on an individual's ability to work even if the individual's age, education, or work experience were specifically considered (i.e., the person's impairment(s) has no more than a minimal effect on his or her physical or mental abilities(s) to perform basic work activities). Thus, even if an individual were of advanced age, had minimal education, and a limited work experience, an impairment found to be not severe would not prevent him or her from engaging in SGA.

The severity requirement cannot be satisfied when medical evidence shows that the person has the ability to perform basic work activities, as required in most jobs. Examples of these are walking, standing, sitting, lifting, pushing, pulling, reaching, carrying or handling, seeing, hearing and speaking, understanding, carrying out, and remembering simple instructions, use of judgement, responding appropriately to supervision, coworkers, and usual work situations, and dealing with changes in a routine work setting. Thus, these basic work factors are inherent in making a determination that an individual does not have a severe medical impairment.

Although an impairment is not severe if it has no more than a minimal effect on an individual's physical or mental abilities(s) to do basic work activities, the possibility of several such impairments combining to produce a severe impairment must be considered. Under 20 CFR, sections 404.1523 and 416.923, when assessing the severity of what such impairments an individual may have, the adjudicator must assess the impact of the combination of those impairments on the person's ability to function, rather than assess separately the contribution of each impairment to the restriction of his or her activity as if each impairment existed alone. A claim may be denied at step two only if the evidence shows that the individual's impairment(s), when considered in combination, are not medically severe (i.e., have no more than a minimal effect on the person's physical or mental abilities(s) to perform basic work activities). If such a finding is not clearly established by medical evidence, however, adjudication must continue through the sequential evaluation process.

Inherent in a finding of a medically not severe impairment or combination of impairments is the conclusion that the individual's ability to engage in SGA is not seriously affected. Before this conclusion can be reached, however, an evaluation of the effects of the impairment(s) on the person's ability to do basic work activities must be made. A determination that an impairment(s) is not severe requires a careful evaluation of the medical findings which describe the impairment(s) and an informed judgment about its (their) limiting effects on the individual's physical and mental ability(ies) to perform basic work activities; thus, an assessment of function is inherent in the medical evaluation process itself. At the second step of sequential evaluation, then, medical evidence alone is evaluated in order to assess the effects of the impairment(s) on ability to do basic work activities. If this assessment shows the individual to have the physical and mental ability(ies) necessary to perform such activities, no evaluation of past work (or of age, education, work experience) is needed. Rather, it is reasonable to conclude, based on the minimal impact of the impairment(s), that the individual is capable of engaging in SGA.

By definition, basic work activities are the abilities and aptitudes necessary to do most jobs. In the absence of contrary evidence, it is reasonable to conclude that an individual whose impairments do not preclude the performance of basic work activities is, therefore, able to perform his or her past relevant work. If the medical evidence establishes only a slight abnormality(ies) which has no more than a minimal effect on a claimant's ability to do basic work activities, but evidence shows that the person cannot perform his or her past relevant work because of the unique features of that work, a denial at the "not severe" step of the sequential evaluation process is inappropriate. The inability to perform past relevant work in such instances warrants further evaluation of the individual's ability to do other work considering age, education, and work experience.[1]

Great care should be exercised in applying the not severe impairment concept. If an adjudicator is unable to determine clearly the effect of an impairment or combination of impairments on the individual's ability to do basic work activities, the sequential evaluation process should not end with the not severe evaluation step. Rather, it should be continued. In such a circumstance, if the impairment does not meet or equal the severity level of the relevant medical listing, sequential evaluation requires that the adjudicator evaluate the individual's ability to do past work, or to do other work based on the consideration of age, education, and prior work experience.

[1]This provision does not conflict with, nor negate, the policy stated in SSR 82-63 concerning special "no recent or relevant work experience" cases. In such cases an individual must be found to have a severe impairment, i.e., one which has more than a minimal effect on the person's physical or mental ability(ies) to perform basic work activities, in order to be considered under the special provision of that Ruling.

EFFECTIVE DATE: On publication.

CROSS-REFERENCES: Program Operations Manual System, sections DI 00401.390–DI 00401.410; DI A00401.390–DI A00401.410.

TITLES II AND XVI: THE SEQUENTIAL EVALUATION PROCESS

PURPOSE: To state the policy regarding sequential evaluation of disability as set forth in the regulations and to explain and clarify the provisions so there is a better understanding of this policy which will result in the correct and consistent application of these provisions of the regulations

CITATIONS (AUTHORITY): Sections 216(i), 223(d), and 1614(a) of the Social Security Act, as amended; Regulations No. 4, Subpart P, sections 404.1510, 404.1520, 404.1521, 404.1525, 404.1526, 404.1528, 404.1545, 404.1560-404.1572, 404.1577, 404.1578 and Appendix 1; Regulations No. 16, Subpart I, sections 416.910, 416.920, 416.921, 416.925, 416.926, 416.928, 416.945, and 416.960-416.972

INTRODUCTION: In determining whether an individual (except for a title II widow, widower, or surviving divorced spouse, or a title XVI child under age 18 or "statutorily blind" individual) is disabled, the regulations state that a sequential evaluation process is followed whereby current work activity, severity and duration of the impairment(s), ability to do past work and vocational factors are considered in that order. (To be found disabled, title II widows, widowers, or surviving divorced spouses and title XVI children under age 18 must meet or equal the Listing of Impairments in Appendix 1, Subpart P of the Regulations.) (See SSR 82-53 (PPS-74 Basic Disability Evaluation Guides).) This policy statement explains sequential evaluation by going through each step of the process. Where appropriate, cross-references are made to: (1) other PPS's which cover, in greater detail, specific steps in the process; or (2) pertinent regulatory provisions which are self-explanatory and not repeated here.

POLICY STATEMENT: If a title II or title XVI claimant is not working or his or her work does not demonstrate the ability to engage in any substantial gainful activity (SGA) during the period in which disability is alleged, we give primary consideration to the severity of the individual's impairment(s). In addition, if medical considerations alone are not determinative of the issue of disability for a title II worker or childhood disability claimant or for a title XVI claimant age 18 or older, we consider the ability to do past relevant work and the individual's age, education, training and work experience, as they relate to the ability to perform any other work.

The following evaluation steps are followed in the sequence shown, *but when a determination or decision that an individual is or is not disabled can be made at any step, evaluation under a subsequent step is not necessary.*

Is the Individual Engaging in Substantial Gainful Activity?

When an individual is actually engaging in SGA or did so during any pertinent period, and there is no possibility of establishing a period of disability which ended prior to the date of the decision, a finding shall be made without consideration of either medical or vocational factors that the individual is not under a disability. When a title II or title XVI claimant is not (or was not) actually engaging in SGA, primary consideration is given to the severity of the individual's impairment(s). (See SSR 81-7 (PPS-55 Substantial Gainful Activity Earnings Guidelines After 1977) and SSR 81-39 (PPS-60 Determination of Substantial Gainful Activity of Employees, etc.) which further explain some of the basic concepts.)

Does the Individual Have a Severe Impairment?

A finding of ability to engage in SGA may be justified on the basis of medical considerations alone when the degree of a medically determinable impairment is found to be not severe. A not severe impairment may consist of *one or more* separate conditions that do not significantly limit the individual's physical or mental capacity to perform basic work-related functions.

Performance of basic work-related functions involves a capacity for sitting, standing, walking, lifting, pushing, pulling, handling, seeing, hearing, communicating, and understanding and following simple instructions. When there is no significant limitation in the ability to perform these types of basic work-related functions, an impairment will not be considered to be severe even though it may prevent the individual from doing work that the individual has done in the past. Inasmuch as a nonsevere impairment is one which does not significantly limit basic work-related functions, neither will a combination of two or more such impairments significantly restrict the basic work-related functions needed to do most jobs. However, when a nonsevere impairment(s) is imposed upon a severe impairment(s), the combined effect of all impairments must be considered. (See SSR 82-55 (PPS-84 Medical Impairments That Are Not Severe).)

Does the Individual Have an Impairment(s)
Which Meets or Equals the Listing?

A finding of disability will ordinarily be justified when the individual's impairment is one which is as severe as the impairments contained in the Listing of Impairments. The Listing of Impairments (see Regulations No. 4, Subpart P, Appendix 1) contains over 100 medical conditions which would ordinarily prevent an individual from engaging in *any* gainful activity. The Listing helps to assure that determinations or decisions of disability have a sound medical basis, that claimants receive equal treatment throughout the country, and that the majority of persons who are disabled can be readily identified.

The level of severity described in the Listing is such that an individual who is not engaging in SGA and has an impairment or the equivalent of an impairment described therein is generally considered unable to work by reason of the medical impairment alone. Thus, when such an individual's impairment or combination of impairments meets or equals the level of severity described in the Listing, and also meets the duration requirement, disability will be found on the basis of the medical facts alone in the absence of evidence to the contrary (e.g., the actual performance of SGA, or failure to follow prescribed treatment without a justifiable reason). *The claimant's impairment(s) must meet or equal a listed impairment for a favorable determination or decision to be based on medical considerations alone.*

Evaluating Medical Equivalence—Medical Judgment Required

For an impairment to be found to be equivalent in severity to a listed impairment, the set of symptoms, signs and laboratory findings in the medical evidence supporting a claim must be compared with and found to be equivalent in terms of medical severity and duration to the set of symptoms, signs and laboratory findings specified for a listed impairment. When the individual's impairment is not listed, the set for the most closely analogous listed impairment is used.

Where an individual has a combination of impairments, none of which meets or equals a listed impairment, and each impairment is manifested by a set of symptoms and relevant signs and/or abnormal laboratory findings, the collective medical findings of the combined impairments must be matched to the specific set of symptoms, signs, and laboratory findings of the listed impairment to which they can be most closely related. The mere accumulation of a number of impairments will not establish medical equivalency. In no case are symptoms alone a sufficient basis for establishing the presence of a physical or mental impairment.

Any decision as to whether an individual's impairment or impairments are medically the equivalent of a listed impairment must be based on medical evidence demonstrated by medically acceptable clinical and laboratory diagnostic techniques, including consideration of a medical judgment about medical equivalence furnished by one or more physicians designated by the Secretary. The Disability Determination Services physician's documented medical judgment as to equivalency meets this regulatory requirement.

Interrelationship of Medical and Vocational Factors

Title II Worker or Childhood Disability Beneficiary/Title XVI Claimant Age 18 or Older

When a determination cannot be made on the basis of the medical factors alone (i.e., when the impairment falls short of the level of severity depicted by the Listing, yet there is a significant limitation in the ability to perform basic work-related functions), the sequential evaluation

process must continue with consideration of the vocational factors in the claim. *A finding of ability to engage in any SGA cannot be justified solely on the grounds that the impairment does not meet or equal the level of severity depicted by the Listings.*

Evaluation under Regulations No. 4, section 404.1520(e) and (f) and Regulations No. 16, section 416.920(e) and (f) requires careful consideration of whether the individual can do past relevant work (PRW), and if not, whether he or she can reasonably be expected to make a vocational adjustment to other work. When the individual's residual functional capacity (RFC) precludes meeting the physical and mental demands of PRW, consideration of all the facts of the case will lead to a finding that (1) the individual has the functional and vocational capacity for other work, considering the individual's age, education, and work experience, and that jobs which the individual could perform exist in significant numbers in the national economy, or (2) the extent of work that he or she can do, functionally and vocationally, is too narrow to sustain a finding of ability to engage in SGA.

Since the severity of the impairment must be the primary basis for a finding of disability, this step of the evaluation process begins with an assessment of the claimant's functional limitations and capacities. Then a determination or decision must be made as to whether the individual retains capacity to perform past relevant work. An evaluation is then made of age, education, work experience and training. Consideration of the following principles will help identify the key issues for resolution with respect to these factors. No single factor should be considered as conclusive. They should be applied in combination to the range of work that remains within the claimant's RFC.

Whether the claimant retains the functional capacity to perform work which he or she has done in the past has far-reaching implications and should be developed and explained fully in the disability determination or decision. Neither the determination or decision nor the denial notice should concede inability to do past work unless there is adequate documentation to establish the fact. Since this is an important and, in some instances, a controlling issue, every effort should be made to secure evidence that resolves the issue clearly and explicitly.

The vocational factors as well as RFC are described in detail as follows:

- *RFC*—RFC is the remaining ability to perform work-related physical and mental activities. The claimant's functional capacity must be defined in terms of the claimant's ability to function in a work setting. When multiple impairments are involved, the assessment of RFC reflects the restrictions resulting from all impairments (both severe and not severe impairments). This assessment is based on all relevant evidence pertaining to RFC consistent with appropriate clinical and laboratory findings.

  Assessment of physical capacities (e.g., strength and exertional capabilities) includes an evaluation of the individual and indicates

his or her maximum RFC for sustained activity on a regular basis. Such assessment also includes an evaluation of the ability to perform significant physical functions such as walking, standing, lifting, carrying, pushing, or pulling, and such other physical traits and sensory characteristics as reaching, handling, seeing, hearing, and speaking insofar as limited capacity to perform these activities may affect the individual's capacity for work for which he or she would otherwise be qualified.

Any medically determinable impairment(s) not resulting in exertional limitations (such as certain mental, sensory or skin impairments) must be considered in terms of the limitations resulting from the impairment. When an individual has such impairment(s) in addition to an exertional impairment(s), remaining functional capacity must be assessed in terms of the degree of any additional narrowing of the individual's work-related capabilities. The assessment of impairments because of mental disorders includes consideration of such factors as the ability to understand, to carry out and remember instructions, and to respond appropriately to supervision, coworkers, and customary work pressures in a routine work setting.

The RFC assessment is based primarily on the medical findings, i.e., the symptoms, signs, and laboratory results, which must be complete enough to permit and support the necessary judgments concerning the individual's physical, mental, and sensory capacities and any environmental restrictions. Descriptions and observations of the claimant's restrictions by medical and nonmedical sources in addition to those made during formal medical examinations must also be considered in the determination of RFC.

Where no issue with respect to specific physical or mental capacities is raised by the allegations of the individual or the evidence obtained, the individual is considered to have no restrictions with respect to those capacities. The individual has the burden of proving that he or she is disabled and of raising any issue bearing on that determination or decision.

For the purpose of determining the exertional requirements of work in the national economy, jobs are classified as "sedentary," "light," "medium," "heavy," and "very heavy." Such terms have the same meanings as are used in the *Dictionary of Occupational Titles*, published by the Department of Labor (DOL), and when used in making disability determinations or decisions are used as follows: sedentary work, light work, medium work, heavy work, and very heavy work. In order to evaluate the claimant's skills and to help determine the existence in the national economy of work the claimant is able to do, occupations are classified as unskilled, semiskilled, and skilled. For classifying these occupations, material published by the DOL are used.

- *Age*—The term "age" refers to chronological age and the extent to which it affects the individual's ability to adapt to a new work situation and engage in work in competition with others. Reference sources and materials dealing with chronological age in terms of vocational impact point to a direct relationship between age and the ability to adjust to other work.

  These sources and materials reflect employment problems developing at age 45 and the problems becoming significantly intensified at age 55. Thus, the regulations reflect age 55 and over as "advanced age," representing the point when age could be expected to be an adverse consideration in determining an individual's vocational adaptability to work differing from that of his or her past experience. However, "disability is *never* determined on the basis of age alone. The following age classifications are established in Regulations Nos. 4 and 16 (see sections 404.1563 and 416.963): younger person, person approaching advanced age, and person of advanced age. These designations of age are an expectancy only, not arbitrary limits, and may not be crucial in a particular case. Age categories are not applied mechanically in borderline cases.

- *Education and Training*—Education generally refers to formal schooling; training refers to skills and knowledge acquired on the job or through general experience in an industry or field of work. Both can significantly affect ability to work, and must therefore be considered in evaluating the impact of an impairment on an individual claimant. (Regulations Nos. 4 and 16, sections 404.1564 and 416.964, establish the following classifications of educational levels: illiteracy, marginal education, limited education, high school and above, and inability to communicate in English.)

  Training that is vocationally significant prepares an individual to do a specific job or provides background to do a number of jobs in the same field. Training that is not reflected in the individual's actual work experience would raise questions as to its adequacy and current usefulness to the individual. Content, duration, and recency should be considered in determining the scope and application of training and its current usefulness. Normally, if an individual completed training more than 15 years prior to the point at which the claim is being considered for adjudication (or when the earnings requirement was last met if earlier) and did not make use of it in his or her work, it would not affect the claimant's vocational outlook at the present time. Moreover, even if completed within the 15-year period, training would not ordinarily be expected to qualify an individual for more than entry level (e.g., at the apprenticeship or lowest beginning level) occupations. Therefore, care should be exercised to assure that undue weight is not attributed to training and to ascertain how training can be utilized in occupations.

- *Experience*—The jobs a person has done, the length of time spent at them, and the recency of the work are major factors in determining his or her ability to work. Work experience is relevant when it was performed within the pertinent 15-year period, lasted long enough for the individual to learn the job, and consisted of SGA. Work experience must be examined in the light of available knowledge of the physical and skill demands of different kinds of work in order to evaluate the effect of the impairment on the person's ability to return to past relevant work or to utilize remaining capacities in other jobs. (For a more detailed discussion of prior work experience, see SSR 82-62 (PPS-80: A Disability Claimant's Capacity to Do Past Relevant Work).)

The RFC assessment is used to determine whether an individual can perform past relevant work or considering an individual's age, education and work experience, other work which exists in the national economy.

- *Capacity to Do Past Relevant Work*—The RFC to meet the physical and mental demands of jobs a claimant has performed in the past (either the specific job a claimant performed or the same type of work as it is customarily performed throughout the economy) is generally a sufficient basis for a finding that the individual is not disabled. Past work experience should be considered carefully to assure that the available facts support conclusions regarding the claimant's ability or inability to perform this work.

  Where an individual with a marginal education and long work experience of 35 years or more limited to the performance of arduous unskilled physical labor is not working, and is no longer able to perform such labor because of a severe impairment(s), such an individual will generally be found to be disabled. (See Regulations Nos. 4 and 16, sections 404.1562 and 416.962.) Also a person generally will be found disabled if he or she has a severe impairment of any nature, is of advanced age, has a limited education, and has no relevant work experience.

  If the individual is able to meet the physical and mental demands of past relevant work, he or she should be found not disabled. However, the inability to do past relevant work is not in itself a basis for a finding of disability.

- *Capacity to Do Other Work*—If an individual cannot perform any past relevant work because of a severe impairment(s), but the remaining physical and mental capacities are consistent with meeting the physical and mental demands of a significant number of jobs (in one or more occupations) in the national economy, and the individual has the vocational capabilities (considering age, education, and past work experience) to make an adjustment to work different from that performed in the past, it shall be determined that the individual is not disabled.

> However, if an individual's physical and mental capacities in conjunction with his or her vocational capabilities (considering age, education and past work experience) do not permit the individual to adjust to work different from that performed in the past, it shall be determined that the individual is disabled.

The assessment ability to engage in SGA involves the evaluation of such factors as the functional capacity to perform the physical or mental exertion of work and to sustain work at a level which meets the standards of SGA on a regular and continuing basis. In all such cases where a determination or decision regarding disability is to be made, the evidence must be sufficient to permit a comparison between the claimant's capabilities and limitations and the requirements of relevant occupations.

The regulations require that, at this point in the sequential evaluation process, the rules established in Appendix 2 to Subpart P of Regulations No. 4 must be used to direct or to guide the determination as to whether the individual is "disabled." Where all factors relative to an individual coincide with those in a rule in the Appendix, that rule directs a conclusion as to whether the individual is "disabled." When all factors do not coincide with a rule (e.g., the individual has the RFC for more than light work but for less than the full range of medium work), the rules are used as a frame of reference for determining whether the individual is "disabled."

Similarly, when an individual has a combination of exertional and nonexertional impairments, the rules are used as a frame of reference for determining "disability." The exertional impairment is considered first under the applicable rule, and then the additional restriction(s) imposed by the nonexertional impairment is considered.

When an individual has a solely nonexertional impairment, the principles established in the regulations are applied in determining "disability," giving consideration to the rules for specific case situations described in Appendix 2 (i.e., use of the rules as a frame of reference). When the nonexertional impairment is a mental impairment, the ability to concentrate, to understand, to carry out and remember instructions, and to respond appropriately to supervision, coworkers, and pressures in a work setting are considered. (See Regulations Nos. 4 and 16, sections 404.1545(c) and 416.945(c).)

The Disability Determination or Decision

The disability determination or hearing decision must be set forth carefully. The rationale must reflect the sequential evaluation process, describe the weight attributed to the pertinent medical, nonmedical and vocational factors in the case, and reconcile any significant inconsistencies. Reasonable inferences may be drawn, but presumptions, speculations and suppositions should not be substituted for evidence.

If the determination or decision is based on medical-vocational considerations, it must always contain findings that the individual is not engaging in SGA, there is a severe impairment, but that the individual's impairment(s) does not meet or equal that of any impairment described in the Listing of Impairments; must describe the individual's specific RFC; and must sequentially relate it to physical and mental demands of past work or other substantial work to which the individual could or could not be expected to make a vocational adjustment by reason of her or his age, education and past work experience. Each finding of fact must be based on supporting evidence.

In the rationale for a denial, a mere conclusion that "the impairment(s) is not severe enough to prevent the claimant from engaging in SGA" is insufficient. If the evidence establishes that the impairment(s) is "not severe," the rationale *must* show that the impairment(s) would not significantly affect the performance of basic work-related functions. If a denial may not be made on this basis, the rationale must reflect the remainder of the sequential evaluation process.

Similarly, an allowance based on a mere conclusion that the claimant is "not able to engage in SGA" is insufficient. The rationale must state fully the reasons for the inability to engage in SGA based on the evidence of record, the applicable regulations, and the determinative step in the sequential evaluation process. Under the regulations, a finding that an individual's impairment(s) does not meet or equal the Listing effectively indicates that he or she has a sufficient work capability at the sedentary or a higher exertional level, to require medical-vocational evaluation. Therefore, an allowance determination or decision based on a conclusion that "the claimant has no RFC" is never appropriate. If the impairment(s) does not meet or equal the Listing, the rationale *must* reflect the remainder of the sequential evaluation process. If the claimant does not, in fact, have the RFC for a full range of sedentary work, the case must be evaluated within the framework of the vocational rules. The functional restrictions which limit the claimant to less than the full range of sedentary work must be specified. It must then be determined whether, considering all of the functional limitations, a "significant number" of sedentary jobs which the claimant can perform exists in the national economy.

Where denial is on the basis of duration, if based on medical-vocational considerations, the projected RFC must similarly be described and related.

EFFECTIVE DATE The policy explained herein was effective on August 20, 1980, the date the regulations covering the basic policy in the subject area were effective (45 FR 55566).

CROSS-REFERENCES Program Operations Manual System, sections DI 2102-2102B, 2103, 2105, 2380, and 2383.

TITLES II AND XVI: MEDICAL IMPAIRMENTS THAT ARE NOT SEVERE

PURPOSE: To enunciate the policy regarding nonsevere impairments and to provide examples of impairments that are not severe in order to more clearly illustrate the level of severity required before the concept of "nonsevere impairment" can be applied in the sequential evaluation of disability.

CITATIONS (AUTHORITY): Sections 216(i), 223(d), and 1614(a)(3)(A) of the Social Security Act, as amended; Regulations No. 4, sections 404.1520 and 404.1521; and Regulations No. 16, sections 416.920 and 416.921.

PERTINENT HISTORY: Regulations No. 4, section 404.1502(a), published in 1960, introduced the principle that a denial determination may be made on the basis of medical considerations alone. It stated that

> "... medical considerations alone may justify a finding that the individual is not under a disability where the only impairment is a slight neurosis, slight impairment of sight or hearing, or other slight abnormality or combination of slight abnormalities."

Sections 404.1504 and 416.904 of the regulations published in 1978 revised the 1960 statement and included a statement on work-related functions as follows:

> "... medical considerations alone can justify a finding that an individual is not under a disability where the medically determinable impairment is not severe. A medically determinable impairment is not severe if it does not significantly limit an individual's physical or mental capacity to perform basic work-related functions."

The meaning of work-related functions was explained in 1980 by sections 404.1521 and 416.921 of the regulations which now provide:

(a) "Nonsevere impairment. An impairment is not severe if it does not significantly limit your physical or mental abilities to do basic work activities."

(b) "Basic work activities. When we talk about basic work activities, we mean the abilities and aptitudes necessary to do most jobs. ..."

Examples of basic work functions are included in sections 404.1521(b) and 416.921(b).

Throughout this period of regulatory revision, we have tried to identify medical conditions which demonstrate nonsevere impairments. Based on increasing experience and extensive consultation with disability program physicians, 20 examples of medical conditions that are not severe

have now been recognized. These 20 examples are intended to illustrate a level of impairment severity where the evaluation principle for nonsevere impairments applies. In addition, these 20 examples, while not exhaustive, represent a significant number of specific impairments that serve as guidelines of the level of impairment severity which would warrant a finding that an individual's impairment is not severe.

POLICY STATEMENT: In determining whether an individual is disabled, we follow a sequential evaluation process whereby current work activity, severity and duration of impairment, residual functional capacity (RFC), and vocational factors (age, education and work experience) are considered in that order.

Built into this process is the statutory requirement that to be found disabled, an individual must have a severe medically determinable impairment. For an impairment to be considered severe, it must significantly limit the individual's physical or mental capacity to perform one or more basic work-related functions such as standing, walking, lifting, handling, seeing, hearing, speaking, and understanding and following simple instructions. An impairment that does not significantly limit the capacity to perform work-related functions, as they are required in most jobs, is not severe.

At that stage in the sequential evaluation process, when we may decide that an impairment is not severe, we do not consider the effects of age, education, and work experience (i.e., the vocational factors) since in such cases the determination is based on medical considerations alone. Similarly, the individual's RFC is not assessed in cases in which the individual's impairment is determined to be not severe. In such cases, the RFC assessment is not relevant because it is based upon functional limitations which result from a severe impairment, and, thus, it only comes into play at a later stage in the sequential evaluation process.

If an individual had a highly selective job involving unusual work-related functions, a nonsevere impairment may prevent him or her from performing his or her previous work. However, when an individual has a "nonsevere" impairment, no serious question of inability to engage in substantial gainful activity is present because the individual would clearly be able to perform the basic work-related functions as they are required in most jobs. The inability to perform prior work in such an instance would arise from *both* the specific demands of the work and the impairment rather than the impairment itself.

If the individual's impairment is shown by the medical evidence to be not severe in accordance with the criteria and examples described herein, that impairment cannot itself prevent performance of work-related functions, except as they may be required in a highly selective group of jobs. To be found disabled, an individual must have a severe medically determinable impairment. That standard cannot be satisfied by any impairment(s) that is compatible with the ability to perform basic work-related functions as required in most of the numerous jobs in the national economy.

Inasmuch as a nonsevere impairment is one which does not significantly limit basic work-related functions, neither will a combination of two or more such impairments significantly restrict the basic work-related functions needed to do most jobs. However, when a nonsevere impairment(s) is imposed upon a severe impairment(s), the combined effect of all impairments must be considered in assessing RFC.

The following examples are merely representative of the types of impairments which would be considered not severe and are not intended to be all inclusive. In formulating these examples, the potential for severe and prolonged pain has been considered. These conditions are not expected to produce symptoms of severe and prolonged pain.

1. Musculoskeletal

   a. Osteoarthritis corroborated by X-ray findings, with symptoms of pain and stiffness of lumbar or cervical spine or major joints, and minimal abnormal findings on physical examination.

   b. Traumatic fracture of a vertebral body, in the absence of metabolic bone disease, with loss of less than 50 percent of height of the vertebra without significant physical findings or neurologic abnormalities.

   c. Excision of lumbar disc has been performed and there are no ongoing significant motor abnormalities or significant objective abnormal physical findings.

2. Special Senses

   a. Retention of best corrected visual acuity of 20/40 in the better eye (phakic) without significant restriction of visual fields.

   b. Retention of visual field in better eye of a radius of 45 degrees or better (visual field efficiency of approximately 70 percent).

3. Respiratory

   a. Obstructive airway disease where FEV_1 or MVV is greater than values shown in the table below, and there is no clinical evidence of impairment of gas exchange.

Height* (Inches)	FEV_1 (L/Min., BTPS)	MVV (MBC) (L/Min., BTPS)
60 or less	1.4	56
61-63	1.5	60
64-65	1.6	64
66-67	1.7	68

Height* (Inches)	FEV, (L/Min., BTPS)	MVV (MBC) (L/Min., BTPS)
68-69	1.8	72
70-71	1.9	76
72 or more	2.0	80

*Height without shoes

b. Diffuse pulmonary fibrosis where the arterial blood gas values do not meet the requirements of Listing 3.04, table III, at an exercise level of 25 ml. O_2/kg./min., or work equivalent.

4. Cardiovascular

a. Hypertension without significant organ damage, current or past.

b. History of chest pain without specific ischemic findings on ECG (rest and exercise), less than 50 percent narrowing on angiography, and without significant cardiomegaly.

c. Surgery has been performed for peripheral arterial disease and there are palpable pulses below the femoral level and no intermittent claudication.

5. Digestive

a. Colostomy, uncomplicated, with proper function of the stoma and nutrition adequately maintained.

b. Peptic ulcer, uncomplicated or with recovery from complications.

c. Chronic liver disease, in the absence of ascites, with total bilirubin less than 1.5 mg. per deciliter and serum albumin is 3.5 gm. per deciliter or greater.

d. Inflammatory bowel disease (regional enteritis, ulcerative colitis) in clinical remission for 12 months prior to adjudication.

6. Genito-Urinary

a. Nephrotic syndrome, in remission, with persistent mild edema in which urinary protein excretion is less than 500 mg. per 24 hours and serum albumin of 3.5 gm. per deciliter or greater.

b. Chronic renal disease (other than nephrotic syndrome) in which the serum creatinine is persistently less than 3 mg. per deciliter (100 ml.), in the absence of clinical complications.

7. Endocrine

   a. Diabetes mellitus, adult onset, controlled on prescribed therapy, without significant end-organ damage or recent episodes of acidosis

8. Neurological

   a. Epilepsy with no major motor seizures for 12 months prior to adjudication

   b. Peripheral neuropathy or neuritis, due to any cause, with no significant motor or sensory loss

9. Mental Disorders

   a. IQ of 80 or greater in all major areas of intellectual functioning

EFFECTIVE DATE: The policy explained herein was effective on August 20, 1980, the date the regulations covering the basic policy in the subject area were effective (45 FR 55566)

CROSS-REFERENCE: Program Operations Manual System, section 2107

(PPS-89) **SSR 82-52**

TITLES II AND XVI: DURATION OF THE IMPAIRMENT

PURPOSE: To state and explain the policy regarding the duration requirement under the disability provisions of titles II and XVI of the Social Security Act and implementing regulations

CITATIONS (AUTHORITY): Sections 223(d), 216(i), and 1614(a) of the Social Security Act, as amended; Regulations No. 4, Subpart P, sections 404.1505, 404.1509, 404.1522, 404.1598; and Regulations No. 16, Subpart I, sections 416.905, 416.909, 416.922, and 416.998

INTRODUCTION: To be found disabled, and individual must be unable to engage in any substantial gainful activity (SGA) by reason of a medically determinable physical or mental impairment(s) which can be expected to result in death, or which has lasted or can be expected to last for a continuous period of at least 12 months. In considering "duration," it is the inability to engage in SGA because of the impairment that must last the required 12-month period. (See Social Security Ruling (SSR) 73-7c.) This policy statement explains in detail the documentation and evaluation requirements for determining if the duration requirement is met.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 85-1736

Rosa Lee Brown, Appellant, vs. Margaret M. Heckler, Secretary of Health and Human Services of the United States, Appellee.	* * * * * * * * * * * *	Appeal from the United States District Court for the District of Iowa.

Submitted: February 12, 1986

Filed: March 25, 1986

Before HEANEY and BOWMAN, Circuit Judges, and HANSON,* Senior District Judge.

HEANEY, Circuit Judge.

Rosa Lee Brown appeals from a district court decision affirming the Secretary of Health and Human Services's denial of disability insurance benefits and supplemental security income benefits. For the reasons set forth below, we reverse and remand.

BACKGROUND

Brown is a sixty-two-year-old woman with two years of college training. Her past relevant work was primarily clerical

*The Honorable William C. Hanson, United States Senior District Judge for the United States District Court for the Southern District of Iowa, sitting by designation.

in nature. On May 21, 1982, she applied for disability insurance benefits and supplemental security income benefits under 42 U.S.C. §§ 416(i) and 1381(a), respectively, complaining of heart and back problems, blackout spells, neck pains, muscle spasms, general body pain, and dizziness. She attributes many of her physical problems to automobile accidents in 1978, 1979, and 1980. Brown's daily activities consist primarily of watching television while sitting or lying down. She does not cook, do housework, shop, or engage in social activities. Her pain is aggravated by sitting for more than five minutes, and her abilities to stand and walk are severely limited. She takes Motrin, Valium, and Dalmane daily.[1] The Social Security Administration denied her application both initially and on reconsideration. On May 18, 1984, a hearing was held before an administrative law judge (ALJ), who affirmed the denial. He found that although there was evidence of "early degenerative arthritis in the cervical spine and lumbar spine, early chronic obstructive pulmonary disease, and possible psychophysiological musculoskeletal reaction," Brown had not met the severity requirement of the second step of the sequential evaluation process,[2] and was therefore not disabled. The ALJ's

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[1]Motrin is an anti-inflammatory agent which is used to treat rheumatoid arthritis and osteoarthritis because it reduces joint swelling and pain. Physician's Desk Reference 1959 (36th ed. 1982). Valium is used to manage anxiety disorders as well as to relieve skeletal muscle spasms caused by injury. Id. at 1625. Dalmane is a hypnotic agent used in treating insomnia. Id. at 1587-88.

[2]20 C.F.R. §§ 404.1520 and 416.920, virtually identical provisions, outline the five-step sequential evaluation process used by the Secretary in determining disability for purposes of disability income benefits and supplemental security income benefits. They provide:

> (b) If you are working. If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education, and work experience.

determination became the Secretary's final decision when the Appeals Council denied review. On April 5, 1985, the district court affirmed the Secretary's decision.

On appeal, Brown argues that step two of the sequential evaluation process, as applied by the Secretary, contravenes the Social Security Act (Act). She also states that a remand would be necessary even if step two were valid, since the Secretary's determination of no disability was not supported by substantial

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(c) You must have a severe impairment. If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience. However, it is possible for you to have a period of disability for a time in the past even though you do not have a severe impairment.

(d) When your impairment(s) meets or equals a listed impairment in Appendix I. If you have an impairment(s) which meets the duration requirement and is listed in Appendix 1 or is equal to a listed impairment(s), we will find you disabled without considering your age, education, and work experience.

(e) Your impairment(s) must prevent you from doing past relevant work. If we cannot make a decision based on your current work activity or on medical facts alone, and you have a severe inmpairment(s), we then review your residual functional capacity and the physical and mental demands of the work you have done in the past. If you can still do this kind of work, we will find that you are not disabled.

(f) Your impairment(s) must prevent you from doing any other work. (1) If you cannot do any work you have done in the past because you have a severe impairment(s) we will consider your residual functional capacity and your age, education, and past work experience to see if you can do other work. If you cannot, we will find you disabled.

evidence. For the reasons discussed below, we reverse and remand.

DISCUSSION

Brown questions the validity of the second step of the sequential evaluation process. This regulation requires a finding of "not disabled" if the claimant does not have severe impairments, regardless of the claimant's age, education, or work experience. Brown argues that this regulation contravenes the Social Security Act, which requires a consideration of these vocational factors when determining disability. The Secretary argues that the regulation is consistent with the Act.

The Circuits are divided on this question. Three Circuits[3] have accepted Brown's argument and have invalidated the provision. See Hansen v. Heckler, No. 84-2366 (10th Cir. Feb. 5, 1986); Baeder v. Heckler, 768 F.2d 547, 553 (3d Cir. 1985); Yuckert v. Heckler, 774 F.2d 1365, 1370 (9th Cir. 1985). These Circuits have reasoned that the provision on its face conflicts with the Act. They point out that while the provision explicitly requires the Secretary to disregard the claimant's age, education, and work experience, the Act expressly requires those factors to be taken into account when determining disability.[4]

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[3]The Seventh Circuit has held that the second step is invalid, at least insofar as the Secretary applies it to deny benefits to claimants who are unable to perform their previous work. See Bunch v. Heckler, 778 F.2d 396, 398-99 n.4 (7th Cir. 1985); Johnson v. Heckler, 769 F.2d 1202 (7th Cir. 1985).

[4]42 U.S.C. § 423(d)(2)(A) provides that

> an individual * * * shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in

See Hansen, No. 84-2366, slip op. at 8; Baeder, 768 F.2d at 551; Yuckert, 774 F.2d at 1368. The five other Circuits that have considered the question have refused to invalidate the second step, but have interpreted it as a de minimis, threshold requirement. See e.g., Stone v. Heckler, 752 F.2d 1099, 1101 (5th Cir. 1985); Salmi v. Secretary of Health and Human Services, 774 F.2d 685, 691 (6th Cir. 1985); Evans v. Heckler, 734 F.2d 1012, 1014 (4th Cir. 1984); Brady v. Heckler, 724 F.2d 914, 920 (11th Cir. 1984); Chico v. Schweiker, 710 F.2d 947, 954-55 n.10 (2d Cir. 1983). Under the de minimis approach, "[a]n impairment can be considered as not severe only if it is a slight abnormality which has such a minimal effect on the individual that it would not be expected to interfere with the individual's ability to work, irrespective of age, education, or work experience." Brady, 724 F.2d at 920 (quoting Appeals Council Review of Sequential Evaluation Under Expanded Vocational Regulations (1980)).

Regardless of whether we invalidate the second step or accept it as a de minimis requirement, a remand would be necessary; the record clearly shows that Brown's impairments, at the very least, would meet a de minimis requirement. Even though we could avoid this question, its importance and recurring nature convince us that its prompt settlement is appropriate.

We believe that those Circuits which have invalidated the provision have the stronger argument. Although the second step might be consistent with the Act if the Secretary applied it "as a preliminary screening device to deny a claimant with impairments so minimal that they could under no circumstances have a serious impact on the ability to work," Hansen, No. 84-2366, slip op. at 9, the Secretary has not done so. See Baeder, 768 F.2d at 552 ("a full forty percent of disability applicants

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the national economy * * * .

are denied benefits without any evaluation of their age, education or past relevant work experience"); Hansen, No. 84-2366, slip op. at 10-12. The facts in this case illustrate the manner in which the Secretary actually applies the severity standard. The Secretary found that Brown did not have a severe impairment for the purposes of the second step, despite her finding that Brown suffers from early degenerative arthritis, early chronic obstructive pulmonary disease, and psychophysiological impairments. Therefore, the only practical way to ensure that the Secretary follows the requirements of the Act is to invalidate the second step.[5]

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[5]The Tenth Circuit's arguments on this point were particularly persuasive:

> We must therefore consider how best to remedy the Secretary's apparent continuing intent to apply the step two severity regulation in a manner that conflicts with the Act and the controlling case law. We decline to follow those courts which have construed the regulation to embody a de minimis standard and have reversed and remanded disability determinations which do not clearly accept and apply this construction. Unfortunately, the Secretary has a history of disregarding those controlling court rulings with which she disagrees. [The Secretary displays an] intent to pay mere lip service to the de minimis standard, thus forcing a claimant to pursue a judicial appeal to obtain a disability determination properly made under the applicable law. We believe this imposes an unnecessary hardship on claimants, wastes judicial resources, and works a serious injustice on those whose legitimate claims to disability benefits are improperly denied administratively and who do not appeal.

Hansen, No. 84-2366, slip op. at 12-13 (citations omitted).

We additionally note that interpreting the second step as a de minimis requirement arguably renders it worthless, as it would be hard to conceive of an impairment which is so slight that it would not affect a claimant's ability to work under any circumstances.

In view of the fact that this case must be remanded for a consideration of Brown's ability to work in light of her vocational characteristics as well as her impairments, we make the following additional observations. The Secretary has a duty to develop a full and fair record, regardless of whether or not the claimant is represented by counsel. See e.g., Brissette v. Heckler, 730 F.2d 548, 549 (8th Cir. 1984). In this case, a complete record would fully discuss Brown's work history, the relationship between her automobile accidents and her impairments, and her physical disabilities, particularly her blackouts. The Secretary should also develop the record in regard to the medical opinion of Dr. Bery Engebretsen, Brown's treating physician, as required by Brissette, 730 F.2d at 550, and Lewis v. Schweiker, 720 F.2d 487, 489 (8th Cir. 1983). The need for this is apparent: although Engebretsen reported that Brown had "severe degenerative arthritis" and "chronic obstructive pulmonary disease," the Secretary found that Brown had no severe impairments. On remand, the Secretary should also give careful consideration to Brown's subjective complaints. See e.g., Polaski v. Heckler, 751 F.2d 943, 948 (8th Cir. 1984); Layton v. Heckler, 726 F.2d 440, 442 (8th Cir. 1984); Ragsdale v. Secretary, Department of Health, Education and Welfare, 623 F.2d 528, 530 (8th Cir. 1980). Before the Secretary may disregard Brown's subjective evidence, she must make express credibility findings. See Basinger v. Heckler, 725 F.2d 1166, 1170 (8th Cir. 1984). Finally, the Secretary should consider the disabling effect of any psychophysiological impairments that Brown may have.[6] See Klug v. Weinberger, 514 F.2d 423 (8th Cir. 1975).

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[6]Psychophysiological impairments may themselves render a claimant disabled under the Social Security Act, which defines "disability" in terms of mental, as well as physical, impairments. See e.g., 42 U.S.C. § 423(d)(1); 20 C.F.R. § 404.1520. Such an impairment, if sufficiently severe, may entitle a claimant to a finding of disabled without consideration of vocational factors. See 20 C.F.R. Part 404, Subpart P, App. 1, § 12.04.

In summary, we hold that the second step of the sequential evaluation process is invalid and remand to the Secretary to reconsider her disability determination in accord with this opinion and in light of Brown's age, education, work experience, and physical and mental impairments.

BOWMAN, Circuit Judge, concurring in part and dissenting in part.

I agree that the Secretary has not developed a full and fair record in this case, and therefore, for the particular reasons set forth by the Court, ante at 7, I join in the decision remanding the case to the Secretary for reconsideration. I see no reason, however, to hold the second step of the sequential evaluation process invalid. All the second step really says is that if the claimant's impairments do not significantly limit his or her ability to do basic work activities, then the claimant is not disabled. I do not read this as being merely a de minimis requirement, nor do I believe it is in conflict with the Social Security Act. Rather, I see it as being entirely consistent with the purpose of the Act, which is to compensate persons who cannot work, while denying the benefits of the Act to claimants who can. The statutory factors of age, education, and past work experience are appropriately taken into account, it seems to me, in the fifth step of the sequential evaluation process, which comes into play once the Secretary has determined that because of physical or mental problems the claimant cannot do any of the work he or she has done in the past. Indeed, if we invalidate the second step, then logically we also should invalidate the third step, see ante at 2-3 n.2 (subsection (c)), which like the second excludes consideration of the statutory factors of age, education, and work experience.

The problem in this case, as I see it, is not the sequential analysis, but the Secretary's failure to develop an adequate record and to consider all the evidence that should be considered

if a proper step two determination of wheth-· the claimant has a severe impairment is to be made. Accordingly, I concur in the decision to remand this case, but I respectfully dissent from the Court's holding that the second step of the sequential evaluation process is invalid under the Social Security Act.

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